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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-25

BERNADINE ROSE BROKENLEG,

Petitioner,

v.

BERNARD C. BUTTS, SR., *et ux.*,

Respondents.

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS, EL PASO, TEXAS

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Petitioner, Bernadine Rose Brokenleg, respectfully submits this Reply in order to discuss facts[1] that Respondents have presented to this Court in a misleading way.

[1] Petitioner does not subscribe to any of Respondent's discussion of the law applicable to this appeal and relies on her petition with regard to argument on the law.

Facts which are a matter of record include:

1. Tiffany Lynette Butts, the child whose custody is the subject of this appeal, was born on November 25, 1969. Statement of Facts, page 63.

2. Tiffany resided with Petitioner on the Rosebud Sioux Indian Reservation from May, 1972 to July, 1973, when she was between two years and six months old and three years and eight months old. Statement of Facts, page 67; Pet. App., page 22a.

3. Respondents filed their petition to terminate Petitioner's parental rights on April 10, 1975 when Tiffany was five years and five months old.

4. Tiffany was almost seven years old at the time of trial when she was interviewed by the District Court.

5. Tiffany never made the statements attributed to her in the District Court's Finding of Fact 6. Resp. Br. App., pages 1a-10a.

6. Petitioner had legal custody and the right to physical custody of Tiffany until the entry of the Decree of Termination on December 2, 1976.

7. A psychiatrist was the only expert witness at trial. The doctor, after examining Petitioner and Tiffany, testified for Petitioner:

> In my opinion, Bernadine is a competent mother. She has been a competent mother in the past, which is evidenced by the fact that the child is doing well now . . . . I think Bernadine . . . would make . . . a competent mother for the future . . . . I am impressed with this woman's stability.

Statement of Facts, page 100.

ARGUMENT

THE DECISION OF THE DISTRICT COURT IS CLEARLY BASED ON UNCONSTITUTIONAL CONSIDERATION OF RACIAL FACTORS.

On December 2, 1976, the District Court entered its Decree of Termination. The Decree purported to recite facts. These "facts" merely repeated, virtually verbatim, the language in V.T.C.A. Family Code § 15.02(1)(B) and (F). Petitioner requested findings of fact and conclusions of law in order to determine the actual basis for the District Court decree.

On February 22, 1977, the District Court entered Findings of Fact and Conclusions of Law. Except for Findings of Fact 6 and 7, the Findings of Fact essentially repeat the language of V.T.C.A. Family Code § 15.02 (1)(B) and (F). Thus, it is clear that Findings of Fact 6 and 7 form the primary basis of the District Court decision and were stated in order to elucidate the other findings. This conclusion is supported by the holding of the Court of Civil Appeals that no evidence substantiates the § 15.02(1)(B) and (F) findings of the District Court.[2]

A. Finding of Fact 6

Respondents argue that Finding of Fact 6 is based on a seven year old child's recollections of her life on the Rosebud Sioux Indian Reservation when she was between two and one-half and three years and eight months old. The age of the child renders the recollections suspect.

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[2]The trial record is so completely devoid of evidence to support the District Court decree that the decree must be based on extra-evidentiary considerations. No evidence was adduced in support of Findings of Fact 6 and 7.

See attached Appendix A. And, Tiffany never expressed to the District Court either the words or the substance of Finding of Fact 6.[3] The Finding expresses the views of the District Court, not those of the child. See attached Appendix A.

B. Finding of Fact 7

Respondents argue that Finding of Fact 7 is premised on protecting Tiffany's physical well-being from civil conflict on the reservation. The argument falsifies the evidence.

Respondent's petition to terminate Petitioner's parental rights alleged that Petitioner engaged in conduct that endangered Tiffany's physical well-being under V.T.C.A. Family Code §15.02(1)(E). To support the allegation, Respondents asserted that Tiffany's Rosebud Sioux

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[3] Respondents' characterization of the "desires of the child" is put in focus by the psychiatric testimony offered at trial on behalf of Petitioner:

> I feel there has been a primary bond between Tiffany and Bernadine in the past which has been successful, and it needs to be established at this critical period of the child's life. In my opinion, the child is in a normal growth phase which is the first identification of herself as a young woman. She needs her mother's input into this emotional growth affair . . . . I feel . . . Tiffany is confused about the people in her world.
>
> . . . . [If Tiffany is not returned to her mother's custody], I would feel this would have a lifelong detrimental effect on the future development of Tiffany. I feel she would have a great deal of rejection to deal with. I think she would have a great deal of cultural issues to deal with. I think she would have a great deal of difficulty in trust . . . . I think Tiffany would [have an inability to love and feel close to people] if she continues to be apart from her mother. Statement of Facts, pages 102-104.

Indian Reservation home was in close proximity to Wounded Knee, South Dakota, a scene of civil conflict. Statement of Facts, page 101. The evidence revealed that (1) Wounded Knee is 130 miles from Petitioner's home, (2) Wounded Knee is not on the Rosebud Sioux Indian Reservation, and (3) no civil conflict occurred on the Rosebud Sioux Indian Reservation during the time Tiffany resided there. Statement of Facts, pages 120-121. In fact the civil conflict at Wounded Knee had ended by the time of Tiffany's residence on the Rosebud Sioux Indian Reservation. The District Court made no findings of fact or conclusions of law under §15.02(1)(E). Finding of Fact 7 has no relationship to civil conflicts that posed a threat to Tiffany's physical safety. The Finding is concerned only with racial factors which allegedly threaten Tiffany's well-being.

Finally, Respondents read the mind of the District Court and conclude that, absent the unconstitutional racial considerations in Findings of Fact 6 and 7, the District Court would not alter its custody award. Petitioner can equally speculate that absent such considerations due process would produce a different custody judgment.[4] Petitioner, and other fit parents, consistent

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[4] *Alsager v. District Court*, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd, 545 F.2d 1137 (CA8 1976), states the applicable due process standard: ". . . to preserve the best interests of both parents and children. . . termination [of the parent-child relationship] must only occur where more harm is likely to befall the child by staying with his parents than by being permanently separated from them." 406 F. Supp. at 24, aff'd, 545 F.2d at 1137. *Accord, Roe v. Conn*, 417 F. Supp. 769, 777 (M.D. Ala. 1976). *Alsager* and *Roe* support the proposition that the "threshold of harm" rule is the applicable due process standard in determining parental custody, as well as, permanent termination of the parent-child relationship. There is no evidence and the Court of Civil Appeals did not adopt any of

[footnote continued]

with due process, cannot be denied their fundamental right to the custody of their children based on speculation about what a court would decide if it applied constitutional rather than unconstitutional standards in making a custody award.[5]

CONCLUSION

It would be unprecedented and repugnant to the Fourteenth Amendment to conclude, as Respondents have, that racial considerations are appropriate in determining the custody of a child as between a parent and a non-parent.[6] Such a conclusion would threaten the integrity of the many families in the United States where parents and children have different complexions from one another or from the majority population in their community of residence. Respondents are, in effect,

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the District Court findings that Tiffany will suffer any harm if she is placed in Petitioner's custody. The undisputed evidence, offered by the psychiatrist, is that Tiffany is likely to suffer harm if she is not returned to Petitioner's custody and that Tiffany will benefit from being in Petitioner's custody.

The Court of Civil Appeals below did not strictly scrutinize the evidence generally or under the "threshold of harm" rule. Rather, it preferred to deny an admittedly fit parent the custody of her child under a "stability of the home comparison" test that is unsupported in law as an applicable due process standard in custody cases involving fit parents.

[5] Respondents have been appointed managing conservators of Tiffany. The appointment does not give Respondents permanent custody of Tiffany. Their appointment is subject to continuing court supervision and review. But See Pet., n. 13.

[6] Petitioner agrees with Respondents that racial considerations may be appropriate in determining a suitable adoptive home for a child.

asking this Court to approve the maintenance of racial purity and segregation repudiated by this Court and our Nation.

Since 1973, Respondents have prevented Petitioner from reobtaining the custody of her child. Again, petitioner respectfully urges this Court to issue a writ of certiorari to the Court of Civil Appeals of Texas, El Paso and to reverse the custody decision of that Court and the District Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF TEXAS)
) ss.:
COUNTY OF DALLAS)

Johanna Clevenger, being first duly sworn deposes and says:

1. I am the psychiatrist who examined Tiffany Lynette Butts on November 8, 1976 and who testified the same day before the District Court in In the Interest of Tiffany Lynette Butts, Cause No. 8817, held to determine whether to terminate the parent-child relationship between Tiffany and Bernadine Brokenleg.

2. I have read pages 127-137 of the Statement of Facts of the proceedings before the District Court, in the aforementioned proceedings. These pages are a transcription of an interview with Tiffany Lynette Butts conducted by District Court Judge Ken G. Spencer.

3. Based on my examination of Tiffany and on common knowledge in the field of psychiatry, Tiffany, at age seven, is not at an age of reason. She is at a stage of growth and development characterized by the use of fantasy and fairy stories which help her to understand the world around her, and to explain psychological issues encountered as she grows.

4. The most important psychological issue for Tiffany is the issue of separation from her mother. Tiffany's perception is that her mother abandoned her. The events that she purports to recall of her experiences on the Rosebud Sioux Reservation are in all probability not facts. These events are made up to express Tiffany's present feelings and to help her explain why she is not living with her mother.

5. The "fairy story" events that Tiffany has made up show that her mother was bad and this is Tiffany's explanation for her separation from her mother. This explanation could have catastrophic consequences for Tiffany during adolescence when the potential is great that she will believe that she has the same bad characteristics of her mother. It is crucial that Tiffany and her mother have an opportunity to revive their parent-child relationship.

6. The examination of Tiffany by the District Court provides more of a basis to study the ideas of the District Court regarding a six or seven year old child than it does for an assessment of Tiffany. The only valid "questioning" of Tiffany, to obtain information necessary to a properly reasoned evaluation of her thoughts and feelings, would occur in a playroom setting in which she would have an opportunity to unfold her story in play, in fantasy.

/s/ Johanna Clevenger, M.D.

Subscribed and sworn to
before me this 3rd day of
May, 1977.

/s/ Anna K. Porter
Notary Public